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In the Supreme Court of the United States

OCTOBER TERM, 1957

HOUSTON BELT & TERMINAL RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, FORT WORTH AND DENVER RAILWAY COMPANY, GULF, COLORADO & SANTA FE RAILWAY COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND TEXAS AND NEW ORLEANS RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
HENRY GELLER,
Attorney,
Department of Justice, Washington 25, D. C.
ROBERT W. GINNANE,
General Counsel,
R. FRANKLIN TAYLOR, JR.,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

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Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and the Interstate Commerce Commission move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on September 23, 1957, by a three-judge district court convened under 28 U. S. C. 2284 and 2325,

dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission found that an arrangement as to the interchange of freight cars in Houston, Texas, between the appellant lines owning Houston Belt & Terminal Railway Company (Belt) and the Texas & New Orleans Railroad Company (T&NO), by which all interchanges between the two at Houston are required to be made at the yard of the latter adjacent to a principal intersection of the two railroads, had not been shown to be unlawful.

In 1907, Belt was organized as a joint venture by the appellant lines, or their predecessors in interest, to perform the terminal services of these lines (J. St. 33). Its services are rendered on the basis of payment by the using lines of the actual cost of service provided and not on the basis of published tariff rates (J. St. 34). Since 1934, T&NO has owned and operated a number of railroad properties which previously comprised the Southern Pacific System lines in Houston (J. St. 33–34).

Until 1912, interchange of cars between Belt and the T&NO lines was made to and from their respective yards located at various points in and around Houston (J. St. 34). Due to the increasing growth and resultant traffic congestion within the center of Houston, Belt and T&NO entered into a contract on May 12, 1912, establishing as an interchange point T&NO's Englewood yard, which was adjacent to a principal intersection of Belt and T&NO and was used by T&NO as a storage yard (J. St. 35–36; Ex. 14).

In 1913, T&NO began the conversion of Englewood into its primary trainyard, completing the transformation in February 1915 at a cost of $600,000 (J. St. 36; Tr. 403). T&NO thus eliminated the necessity of moving its cars to and from Englewood interchange and its several yards, while Belt, although no new burdens were imposed on it, still had to move cars to and from Englewood interchange and its yard (J. St. 36–37). In 1929, Belt filed a complaint with the Commission attacking the legality of the arrangement. The complaint, after hearing, was dismissed (*Houston Belt & Terminal Ry. Co.* v. *Texas & N. O. R. Co.*, 168 I. C. C. 260) on the authority of *Baltimore & Ohio Railroad Company* v. *United States*, 277 U. S. 291 (J. St. 37).

For 23 years thereafter, the interchange was effected at Englewood. In 1950, Belt and T&NO modified the existing interchange arrangement in certain minor respects not here pertinent and specifically retained in full force and effect the 1912 contract with its basic feature of physical interchange at Englewood yard (Exs. 25–28). Finally, in 1953, T&NO requested approval of a physical rearrangement of the connecting track at Englewood to enable it to carry out plans to expand Englewood yard and convert it into a modern gravity type yard (Ex. 29). Belt took that occasion to repudiate the existing interchange arrangement and to inform T&NO that unless it agreed to move T&NO cars to Belt's yards, or to pay Belt for doing so, Belt would institute a complaint proceeding before the Commission (Ex. 30). Upon

T&NO's refusal (Exs. 32–33), the present complaint was filed.[1]

In substance, the complaint alleged that the interchange arrangement is in violation of the duty of T&NO (1) to establish just and reasonable rules, regulations, and practices with respect to car service as provided by Section 1 (11) of the Interstate Commerce Act (49 U. S. C. 1 (11)), and (2) to afford all reasonable, proper, and equal facilities for the interchange of traffic and for the receiving and forwarding of property to and from connecting lines under Section 3 (4) of the Act (49 U. S. C. 3 (4)).[2] The Commission was asked to issue an order requiring T&NO to cease and desist from the alleged violations and to establish just and reasonable rules, regulations, and practices for the interchange of freight, and awarding damages.

On April 3, 1956, after hearing, the Commission issued its report (298 I. C. C. 221) and order, finding that the refusal of T&NO to deliver freight to appellants at a point or points other than its Englewood yard or to reimburse appellants for the transfer of freight from Englewood yard to appellants' yards is not unlawful as alleged, and dismissing the complaint

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[1] Subsequently, the parties agreed to shift the connecting track as requested by T&NO, but with the specific reservation that the agreement would in no way prejudice Belt's claim that the entire interchange practice is unlawful (Ex. 34).

[2] The complaint also alleged a violation of section 3 (1) of the Act (49 U. S. C. 3 (1)), but, as the Commission found (J. St. 41), that section is inapplicable to carriers, and appellants do not rely on it here.

(J. St. 43). The Commission concluded (1) that the matters at issue are not within the compass of Sections 1 (11) and 3 (4) of the Act (J. St. 40–41), and (2) that in the light of this Court's decision in *Baltimore & Ohio Ry. Co.* v. *United States, supra,* there was no adequate showing that the interchange arrangement is unjust or unreasonable (J. St. 41–42). The District Court, in an opinion by Circuit Judge Brown, unanimously affirmed the Commission on the latter ground, finding it unnecessary to pass upon the question of the Commission's power to order modification of the interchange arrangement (J. St. 17–29).

ARGUMENT

1. We submit that the Commission and the District Court properly concluded that the instant case is indistinguishable from *Baltimore & Ohio Railroad Co.* v. *United States, supra,* and, therefore, that this appeal presents no question of substance.

In *Baltimore & Ohio,* lines west of the Mississippi (west side lines), for competitive purposes, had long borne the expense of moving across the river to St. Louis westbound through cars brought to East St. Louis by the eastern lines.[3] When competitive conditions changed, the west side lines sought to end this burden of delivery in both directions, and successfully complained to the Commission that the practice was unjust and unreasonable under section 1 (10) and (11) of the Act. The principal issue presented was whether, as the east side lines urged, the com-

[3] The actual transporting was done by a terminal carrier jointly owned by the west and east side lines.

plaint in practical effect involved a division of through rates and revenues under Section 15 (6). This Court concluded that, because the Commission's order operated to take interchange costs off the west side lines and correspondingly put that burden on the east side lines, the controversy was basically financial, *i. e.*, one of divisions or apportionments of revenues derived from through traffic (277 U. S. at 298–9, 300–1; J. St. 24); and that, therefore, even if the matter in controversy were a "practice" as that term is used in Section 1 (11) (which, the Court found, it was not), it could not be set aside, although contrary to the usual practice in the industry, in the absence of evidence in the nature of that required by Section 15 (6) relating to divisions, showing it to be unjust and unreasonable in fact.

No such evidence establishing unreasonableness under Section 15 (6) was presented in the instant case.[4] Appellants, however, attempt to distinguish the *Baltimore & Ohio* case from the instant one, arguing that in the former only the payment of money was involved while here the order sought would affect only operations (J. St. 11, 14). But any such distinction misconceives the rationale of *Baltimore & Ohio*. There, this Court expressly based its decision on the fact that while the Commission's order purportedly "requires no change of divisions of revenues derived

[4] As the Commission found (J. St. 41–42), "* * * this record does not contain any evidence which would indicate that the division of revenues received by the complainants from the joint rates is unreasonable nor that the divisions received are not adjusted or are insufficient to cover the cost of transfer by the Belt."

from traffic moving on joint rates" (277 U. S. at 295), the necessary impact of the order *was* a change in divisions. That is this case also. As the lower court pointed out (J. St. 28), "* * * it is not really the manner of interchange, but the *expense* of delivering these cars which is being complained of. As such, an order of the type sought by Belt could not but have precisely the same effect as that condemned in *Baltimore.*"[5] Appellants themselves have implicitly recognized this in statements made in their complaint and brief before the Commission (J. St. 26–27, 41).[6]

2. While the District Court found it unnecessary to consider the Commission's alternative ground for dismissing the complaint, the Commission's order can

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[5] Appellants' reliance on certain testimony that the manner of effecting interchange never entered into the determination of divisions is similarly misplaced. As the Commission found (J. St. 41–42), division of revenues is necessarily affected by such terminal costs and can be adjusted only after the hearing required by Section 15 (6). The District Court, further pointed out that there was ample evidence that in fixing divisions terminal costs are inevitably evaluated, and that here appellants knew of and presumably weighed such costs (J. St. 28).

[6] In their complaint before the Commission, appellants proposed alternative solutions each designed to relieve it of the expense of transporting cars delivered by T&NO from the present point of interchange to Belt's yards. (Complaint, page 17). One alternative is that T&NO take over one of the two round trips which Belt makes in effecting interchange. The other, labeled by appellants as "the most practical and satisfactory", is for Belt to continue to perform the service and be compensated by T&NO for transfer of T&NO cars to Belt's yards. Both involve a shift in a portion of the financial burden.

be sustained on that ground as well; for neither Section 1 (11) nor 3 (4), upon which appellants rely, is applicable to the instant situation.

Section 3 (4) requires a carrier to afford adequate and equal facilities for traffic interchanged between it and connecting lines. See *Baltimore & Ohio Railroad Company* v. *United States*, 277 U. S. 291, 295; *Pennsylvania R. Co.* v. *United States*, 54 F. Supp. 381, 394 (D. Md.), affirmed, 323 U. S. 588. There is no evidence that the interchange facilities are inadequate or that T&NO is not treating connecting lines equally.

The purpose of the car service provisions of Section 1 (10) and (11) are plainly to facilitate and expedite the movement of property by insuring an adequate supply and proper utilization of the instrumentalities of transportation. *Wisconsin R. R. Commission* v. *C. & N. W. Ry. Co.*, 87 I. C. C. 195. Such matters are in no sense involved in the present case. *Peoria Ry. Co.* v. *United States*, 263 U. S. 528, makes it clear that these provisions do not confer the omnibus power over car interchange for which appellants contend.

As the cases cited by appellants illustrate (J. St. 8–9), the power of the Commission over interchanges is limited to those situations in which (1) a carrier fails to afford equal interchange facilities to its connecting lines, thereby discriminating between them, and (2) the flow of traffic is impeded by inadequate interchange arrangements, the refusal to maintain an

interchange necessary to a through route, the refusal of a carrier to establish an interchange, or the inability of carriers to agree on its establishment. The Commission lacks power, we believe, to prescribe an interchange arrangement where, as here, a completely adequate interchange established by agreement exists and there is no question of unequal treatment of connecting lines.

The Commission aptly characterized the dispute before it when it said (J. St. 42):

> The contract of May 12, 1912, under which the present transfers are made, is one between private parties, the natural effect of which, as carried out, does not, directly or as a mere incident to other purposes, regulate or purport to regulate to any extent interstate commerce. So far as this record is concerned, the public has no interest in its application, and it was entered into at a time when it was necessary to complainants' business. The cost incurred by the defendant in fitting Englewood yard for the interchange of traffic was not inconsequential. After accepting the benefits of the contract for many years, the complainants now seek an order from us which would in effect prohibit the defendants from requiring further performance from the Belt under it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct, and that this appeal presents no substantial question. The judgment of the District Court should be affirmed.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
HENRY GELLER,
Attorney.

ROBERT W. GINNANE,
General Counsel,
B. FRANKLIN TAYLOR, JR.,
Assistant General Counsel,
Interstate Commerce Commission.

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